Supreme Court, U. S.
FILED
APR 21 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

DIANE B. COHN
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Amicus Curiae

April 21, 1978

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT	4
ARGUMENT:	
Absent Proof of the Likelihood of Intimidation of Witnesses in a Particular Unfair Labor Practice Proceeding, Witness Statements are Not *Per Se* Protected From Prehearing Disclosure	6
A. The 1974 Amendments to Exemption 7 Specifically Require Disclosure Absent a Particularized Showing of Harm to a Concrete Law Enforcement Proceeding	7
B. Despite the Potential for Intimidation in Labor Cases, Interference Cannot be Presumed Without a Particularized Showing in Each Case . . .	11
CONCLUSION	20

CITATIONS

Cases:

Administrator, FAA v. Robertson, 422 U.S. 255 (1975)	13
American Jewish Congress v. Kreps, No. 76-1559 (D.C. Cir., March 15, 1978)	13, 14
Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973)	8

Page

Baldwin v. Finney,
Civil Action No. 75-1221 (D.D.C., Orders of October 8, 1975 and January 13, 1976), *vacated and remanded*, Nos. 76-1182, 76-1186, 77-1237 (D.C. Cir., December 8, 1977) 3

Bristol-Myers Company v. FTC,
424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) 7

Center for National Policy Review on Race and Urban Issues v. Weinberger,
502 F.2d 370 (D.C. Cir. 1974) 8, 10

Charlotte-Mecklenberg Hospital Authority v. Perry,
Nos. 76-2272 and 76-2273 (4th Cir., January 26, 1978) 19

Climax Molybdenum Co. v. NLRB,
539 F.2d 63 (10th Cir. 1976) 14

Deering Milliken, Inc. v. Irving,
548 F.2d 1131 (4th Cir. 1977) 5

Department of the Air Force v. Rose,
425 U.S. 352 (1976) 7, 13

Ditlow v. Brinegar,
494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974) 3, 8, 10

Environmental Protection Agency v. Mink,
410 U.S. 73 (1973) 5, 13

Harvey's Wagon Wheel, Inc. v. NLRB,
550 F.2d 1139 (9th Cir. 1976) 15, 17

Page

Local 30, United States Tile and Composition Roofers v. NLRB,
408 F. Supp. 520 (E.D. Pa. 1976) 19

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975) 5, 9

National Public Radio v. Bell,
431 F. Supp. 509 (D.D.C. 1977), *vacated*, No. 77-1419 (D.C. Cir., September 29, 1977) 3

New England Medical Center Hospital v. NLRB,
548 F.2d 377 (1st Cir. 1976) 17

Poss v. NLRB,
565 F.2d 654 (10th Cir. 1977) 17

Soucie v. David,
448 F.2d 1067 (D.C. Cir. 1971) 5

Temple-Eastex, Inc. v. NLRB,
410 F. Supp. 183 (E.D. Tex. 1976) 18

Title Guarantee Company v. NLRB,
534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976) 10, 15, 17

Weisberg v. Department of Justice,
489 F.2d 1195 (D.C. Cir. 1973) *(en banc)*, *cert. denied*, 416 U.S. 993 (1974) 8

Wellford v. Hardin,
444 F.2d 21 (4th Cir. 1971) 7

Statutes and Bills: Page

Freedom of Information Act,
5 U.S.C. § 552 4
5 U.S.C. § 552(b)(3) 13, 14
5 U.S.C. § 552(b)(5) 5
5 U.S.C. § 552(b)(7) 5, 7, 8, 11, 13, 17
5 U.S.C. § 552(b)(7)(A) . . . . . *passim*
5 U.S.C. § 552(b)(7)(D) 16

Pub. L. No. 89-487, 80 Stat. 251 7

Pub. L. No. 94-409, 90 Stat. 1247 13

National Labor Relations Act, 29 U.S.C. § 156 13

Miscellaneous:

Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. (1975) 8, 9, 10, 11, 12, 16

H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974) . . . 16

H.R. Rep. No. 880, Pt. I, 94th Cong., 2d Sess. (1976) . . 14

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) 12

Hearings before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Committee on the Judiciary, United States Senate, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 93d Cong., 1st Sess. (Vol. II) (1973) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

INTEREST OF THE *AMICUS CURIAE*

The Freedom of Information Clearinghouse is a non-profit organization which was founded in 1972 to assist members of the public and the press in the effective use of laws granting a right of access to government-held information. Created out of a philosophy that a democracy functions properly only when there is open government and an informed electorate, the Clearinghouse actively collects and disseminates information by mail and through speeches, conferences, articles and

testimony before Congressional Committees concerning the public's right of access. And for those persons without a significant financial stake in securing information, it is one of the few organizations to which they can turn to obtain experienced legal assistance to pursue their right of access in court.

The Clearinghouse is appearing as *amicus curiae* in this case, with the written consents of the parties, because we believe that this Court's decision may have an impact far beyond the resolution of the narrow controversy presented here. The Court has been asked to address the scope of the investigatory records exemption to the Freedom of Information Act ("FOIA") in a context that undeniably raises legitimate law enforcement concerns: there is a pending unfair labor practice proceeding in which the subject of the proceeding is seeking prehearing access to the statements of those witnesses who will testify in support of the government's case in chief. We are troubled, however, by the fact that the petitioner National Labor Relations Board ("NLRB") urges the Court to adopt the position that, because of the sensitive nature of the employer-employee relationship, all witness statements are *per se* protected from prehearing disclosure, without requiring the Board to distinguish between the statements of employees and others, and without requiring any proof whatsoever that disclosure would interfere with a particular enforcement proceeding in some specific way. Because all law enforcement investigations and proceedings raise special considerations that are unique to the law enforcement responsibilities of the agency involved, whether it be the NLRB, the Securities and Exchange Commission, or the Federal Bureau of Investigation, the Clearinghouse is concerned that the adoption of *per se* protections here will

have a profound, adverse effect upon the public's right of access to documents in a variety of other areas.

Moreover, while an FOIA case brought for discovery purposes surely presents a different set of problems from one in which the Act has been invoked by a concerned citizen or member of the press seeking records of historical or newsworthy interest, acceptance of the view that exemption 7(A) provides blanket protection to whole categories of investigatory records without proof of specific "interference" cannot, we submit, be confined to cases of just the former type, but would undermine the public's right to know in the latter cases as well. *See, e.g., Baldwin v. Finney,* Civil Action No. 75-1221 (D.D.C., Orders of October 8, 1975 and January 13, 1976), *vacated as moot and remanded,* Nos. 76-1182, 76-1186, 77-1237 (D.C. Cir., December 8, 1977). In that case, the district court interpreted exemption 7(A) to afford blanket protection to all so-called "open" files. The court thus permitted the withholding of virtually all records relating to the investigation of former Vice-President Spiro Agnew which led to his no-contest plea to tax evasion charges in 1973, without any showing that disclosure of these particular records would adversely affect any concrete and pending law enforcement investigation or proceeding. *See also National Public Radio v. Bell,* 431 F. Supp. 509 (D.D.C. 1977), *vacated as moot,* No. 77-1419 (D.C. Cir., September 29, 1977) (records relating to an inactive FBI investigation into the death of Karen Silkwood are exempt in their entirety solely because of the "possibility" that law enforcement efforts will continue in the future); *Ditlow v. Brinegar,* 494 F.2d 1073 (D.C. Cir.), *cert. denied,* 419 U.S. 974 (1974) (discussed *infra* at p. 8).

It is *amicus'* view that any interpretation of exemption 7(A) which would relieve the government of its burden of demonstrating that disclosure in a particular case is likely to result in one of the harms enumerated by Congress would nullify the requirement embodied in the 1974 amendments that nondisclosure be permitted "only to the extent that . . . production . . . would interfere" with the government's law enforcement efforts. As demonstrated below, the sensitive relationship which exists between employer and employee may well be relevant to whether there is interference in a particular unfair labor practice case, but it cannot serve as a total substitute for the requisite particularized showing. We believe that the courts are equipped to make determinations sufficient to provide adequate protection to particular unfair labor practice proceedings without creating a special exemption – which is a legislative function – and without adopting a broad interpretation of exemption 7(A) that would serve to undermine Congress' purpose in informing the public about the investigatory activities of the Executive branch.

STATEMENT

This case arose out of a request by Robbins Tire Company under the Freedom of Information Act, 5 U.S.C. § 552, to inspect and copy, at least seven days prior to the start of a pending representation and unfair labor practice proceeding, all statements contained in the NLRB's files by those witnesses whom the Board intends to call at the hearing (App. 37-38). The Board denied this request in its entirety on the grounds that prehearing disclosure would "interfere with law enforcement proceedings," 5 U.S.C.

§ 552(b)(7)(A).[1] In support of its position, the Board contends that it is unnecessary to distinguish between statements by those who are present employees, as opposed to former employees of Robbins Tire, and it has not even indicated how many of those whose statements are sought were never Robbins employees at all. The Board simply argues that, given "the peculiar character of labor litigation," it should be presumed in each case that pre-hearing disclosure of any witness statement or affidavit would "necessarily" interfere with the Board's enforcement proceedings (Pet. Br. at 31).[2]

---

[1] Exemption 7 in its entirety permits the withholding of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

[2] The Board alternatively argues that these statements are exempt in their entirety under 5 U.S.C. § 552(b)(5) as attorney work product. In urging affirmance of the court of appeals' decision, *amicus* will address only the question of whether disclosure of these records would "interfere" with the Board's unfair labor practice proceedings within the meaning of 5 U.S.C. § 552(b)(7)(A). However, *amicus* believes that the Board's exemption 5 argument seeks an unwarranted reversal of a long line of cases which emphasize that a fact/opinion distinction must be made in applying that exemption. *See EPA v. Mink*, 410 U.S. 73, 89 (1973); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131 (4th Cir. 1977); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). We leave fuller argument concerning this issue to respondent.

The district court rejected the Board's claim, and ordered it to provide the requested statements to Robbins Tire at least five days prior to any hearing where the person making the statement or affidavit would be called as a witness (App. 65). In affirming the decision of the district court, the court of appeals concluded that the FOIA "requires disclosure absent the agency's ability to prove the applicability of exemption 7(A) in the context of the particular proceeding involved" (App. 121). The court did recognize that the exemption could be invoked if it were shown, by the presence of any of a number of factors identified by the court, that intimidation of the Board's witnesses was likely to occur in the five days between discovery and the hearing (App. 120). It concluded, however, that the Board's *per se* approach to exemption 7(A) – which essentially argues that the potential for intimidation should be presumed to be so great in every case as to require nondisclosure of all statements and affidavits – is inconsistent with the legislative history of the 1974 amendments to the FOIA, which reveals that Congress amended exemption 7(A) for the specific purpose of requiring the government to demonstrate how disclosure would cause tangible harm to a particular enforcement proceeding in order to justify withholding.

ARGUMENT

ABSENT PROOF OF THE LIKELIHOOD OF INTIMIDATION OF WITNESSES IN A PARTICULAR UNFAIR LABOR PRACTICE PROCEEDING, WITNESS STATEMENTS ARE NOT *PER SE* PROTECTED FROM PREHEARING DISCLOSURE.

Emphasizing that disclosure is the dominant purpose of the Freedom of Information Act and that the exemptions

are to be narrowly construed, *Department of the Air Force v. Rose*, 425 U.S. 352, 360-62 (1976), the court below concluded that, absent the Board's showing that disclosure would "interfere" with the particular unfair labor practice proceeding involved, the FOIA requires disclosure of the witness statements at issue. We urge that the court's rejection of the *per se* approach presented by the Board is not only entirely consistent with, but is affirmatively compelled by, both the language and the legislative history of the 1974 amendments to exemption 7 of the FOIA.

A. The 1974 Amendments to Exemption 7 Specifically Require Disclosure Absent a Particularized Showing of Harm to a Concrete Law Enforcement Proceeding.

As originally enacted, the FOIA exempted from mandatory disclosure all "investigatory *files* compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 80 Stat. 251 (emphasis added). The early cases which interpreted this exemption applied a "harm" analysis, asking whether disclosure of particular documents would actually impede law enforcement efforts by revealing the identity of confidential informants, by exposing secret investigative techniques, or by interfering with enforcement proceedings in some specific way. *See, e.g., Bristol-Myers Company v. FTC*, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *Wellford v. Hardin*, 444 F.2d 21, 23-24 (4th Cir. 1971). In 1973, however, in what was viewed as a particularly sensitive case concerning FBI records of the investigation of the assassination of President Kennedy, the District of Columbia Circuit departed from prior precedent and held that exemption 7 was applicable *per se*

so long as the requested records were contained in a properly designated "investigatory file." *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) *(en banc)*, *cert. denied*, 416 U.S. 993 (1974). *See also Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.) *(per curiam)*, *cert. denied*, 419 U.S. 974 (1974) (in which *Weisberg* was extended to provide blanket protection to files of the National Highway Traffic Safety Administration relating to automobile safety defect investigations); *Center for National Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974) (agency investigatory files concerning public school discrimination practices held *per se* exempt); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973) (army report of the My Lai incident was "compiled for law enforcement purposes" and was thus declared nondisclosable). These cases, which were criticized for "woodenly and mechanically" applying exemption 7 without regard to whether it could be shown that disclosure would adversely affect law enforcement proceedings, were specifically overruled in the 1974 amendments to the FOIA.[3]

Senator Philip A. Hart, who offered the amendment to exemption 7 which was adopted on the Senate floor, explained that the Freedom of Information Act was designed to "provide maximum public access while at the same time recognizing valid governmental and individual interests in confidentiality." Source Book at 334. Senator Hart

---

[3] Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess. (1975) ("Source Book") at 335 (remarks of Senator Kennedy), 349 (colloquy between Senators Kennedy and Hart).

pointed out that those court decisions which had afforded blanket protection to all records contained in an investigatory file had strayed from this basic purpose by failing to require that the government bear its burden of demonstrating that disclosure would harm one of the interests specifically protected by Congress. As Senator Hart noted:

> The [courts] would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.
>
> That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. [Source Book at 332-333]

In order to give effect to Congress' original intent, the first element of Senator Hart's amendment substitutes the term "records" for "files," indicating that courts should examine the particular document at issue, and not the repository for it, in order to determine if nondisclosure is warranted. *Id.* at 332. Most importantly, the amendment also "explicitly places the burden of justifying nondisclosure on the Government," which, in order to invoke the exemption, must show that disclosure of a particular investigatory record would cause one of six enumerated harms, including "interfere[nce] with enforcement proceedings." *Id.* at 333; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 164 (1975). Finally, with respect to the showing required in determining whether or not disclosure will interfere with a law enforcement proceeding, Senator Hart emphasized that *"it is only relevant to make [an exemption 7A] determination in the context of the particular enforcement proceeding."* Source Book at 333 (emphasis added).

While some courts have suggested that this amendment was designed only to require the disclosure of investigatory records contained in closed files, *see Title Guarantee Co. v. NLRB*, 534 F.2d 484, 490-91 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976), the legislative history indicates that Congress specifically considered and rejected any broad open/closed file dichotomy. First, Senator Hart adopted the present language of the amendment from a proposal drafted by a Committee of the American Bar Association, specifically rejecting the approach suggested by Attorney General Elliot Richardson. Under the Justice Department proposal, broad protection for investigatory *files* would have remained but "only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated. . . ." Hearings before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Committee on the Judiciary, United States Senate, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 93d Cong., 1st Sess. (Vol. II) at 227 (1973). While this proposal was included in the record during Senate debate, Source Book at 339, it was ultimately rejected in favor of the language proposed by Senator Hart. Moreover, if Senator Hart had intended his amendment to apply only to closed investigatory files, it would have been unnecessary for him to state that the amendment he proposed was intended to overrule *Ditlow v. Brinegar*, *supra*, and *Center for National Policy Review v. Weinberger*, *supra*, which had applied blanket protections to "open" and "pending" files. *See* Source Book at 349. While it is clear that records in a closed file will rarely if ever meet the test of interference, the converse – that material in an open file need not meet that test – was not adopted by Congress in the 1974 amendments.

The legislative history thus reveals a major reform of the investigatory records exemption to require an inquiry in each case as to whether disclosure would cause one of the harms specifically enumerated by Congress. As the court of appeals recognized below, this requirement is consistent with the purpose of all of the 1974 amendments, which were designed to make it "clear that there can be no blanket claim of confidentiality under any of the exemptions." App. 112, *quoting* Source Book at 293 (remarks of Senator Kennedy).

B. Despite the Potential for Intimidation in Labor Cases, Interference Cannot be Presumed Without A Particularized Showing in Each Case.

Without addressing the fact that the 1974 amendments were specifically designed to require an agency to show why disclosure of a "particular document should not be made," *supra* at p. 9, the Board primarily argues that, in amending exemption 7, Congress did not express any intent to override the strict limitations on discovery in unfair labor practice proceedings which the Board has adopted by rule. The NLRB claims to find support for its position in the only portion of Senator Hart's remarks which addresses the kind of substantive interference that would justify withholding under the new language of the exemption. Senator Hart stated that:

> [Exemption 7(A)] would apply whenever the Government's case in court – a concrete, prospective law enforcement proceeding – would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure

> of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. [Source Book at 333.]

In support of its discovery argument, the Board reads Senator Hart's first reference to a general concern about "premature" disclosure, in conjunction with his recognition of a statement in the 1966 House Report that the original purpose of the provision was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have." Source Book at 332, *quoting from* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). On the basis of this language, the NLRB concludes that "[s]ince the pre-hearing release of Board witness statements under the FOIA would give a person 'earlier' and 'greater access' to those statements than 'he would have directly' in agency proceedings, where they would not be available until after the witness had testified," the policy underlying the original exemption 7, which according to the Board remains unaffected by the subsequent amendment, requires without more that such statements be exempt from disclosure (Pet. Br. at 24).

In rejecting this mechanical "comparative discovery" test, the court of appeals noted, *inter alia*, that the Board's argument is entirely inconsistent with Senator Hart's emphasis that withholding under exemption 7(A) be justified on a case-by-case basis (App. 115). However, the Board's assertion that the FOIA is subservient to discovery rules, which vary from agency to agency, cannot be sustained for a further reason. It is well-established that the exemptions embodied in the FOIA were designed to reflect "*congressional* determination[s] of the types of information that the

Executive branch must have the option to keep confidential, if it so chooses." *EPA v. Mink*, 410 U.S. 73, 80 (1973) (emphasis added); *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976); *American Jewish Congress v. Kreps*, __F.2d__, Civil Action No. 76-1559 (D.C. Cir., March 15, 1978), Slip op. at 9 n.34 ("A central aim of the Freedom of Information Act has been to substitute legislative judgment for administrative discretion"). Thus, the fact that the Board has exercised its discretion in not providing for prehearing discovery by rule has no bearing whatever on whether it has adequately fulfilled the specific Congressional requirement under the FOIA of demonstrating that prehearing disclosure of witness statements would be likely to cause actual harm in a particular unfair labor practice case. Surely, the Board's discovery rules regarding witness statements and affidavits do not make such statements "specifically exempted from disclosure by statute" within the meaning of exemption 3, by virtue of the fact that the National Labor Relations Act empowers the Board to make "such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.[4] *See* Pet. Br. at 14-15.

---

[4] Exemption 3 of the FOIA, which was the subject of Congress' most recent amendment to the Act, provides that documents may be withheld if they are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1247 (1976) (the Government in the Sunshine Act). As the D.C Circuit recently recognized in *American Jewish Congress v. Kreps, supra*, this amendment was designed to overrule the decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975): "[t]he legislative response was a narrowing of Exemp-

(continued)

The Board's argument, in effect, attempts to avoid the necessity of making a particularized showing of harm under exemption 7(A) by elevating its agency discovery rules to the equivalent of a (b)(3) statute, which is the only recognized authority under the FOIA upon which a categorical claim for withholding can be made. The Board cannot succeed in this effort. *See American Jewish Congress v. Kreps, supra.* Indeed, it is ironic that, under the Board's approach, requesters of information are somehow worse off because the Board has exercised its discretion to provide disclosure of some material through discovery than they would be if the Board had no discovery rules at all. The court of appeals was therefore correct in its conclusion that "the protection against interference involves a focus not on the [discovery] rights of the individual FOIA plaintiff but rather on the problems posed to the particular agency proceeding" (App. 116).

As further support for its position, the Board asserts that "[t]he labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is no need for an express showing of interference in each case. . . ." Pet. Br. at 34, *citing Climax Molybdenum Co. v. NLRB*, 539 F.2d 63, 65 (10th Cir. 1976). The Board argues that this intimidation can result in the second type of interference identified by Senator Hart, where disclosure would result in a reduced ability to collect investigatory information (*supra*, at 11-12). The Board argues that "pre-trial disclosure

---

[4] (continued) tion 3 to exclude from its compass laws such as that in *Robertson*, which Congress perceived as giving the agency *'cart blanche'* to withhold any information [it] pleases." Slip. op. at 7, *citing* H.R. Rep. No. 880, Pt I, 94th Cong., 2d Sess. at 23 (1976).

of statements and affidavits would have a 'retarding effect on open and frank Board investigations of alleged unfair labor practices'," since "employees who are interviewed may be reluctant for fear of incurring employer displeasure, to have it known that they have given information." Pet. Br. at 34-35, *citing Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1142 (9th Cir. 1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 491 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976). In this case, the court of appeals rejected these wholesale claims of injury for two reasons: first, "we do not know which of the affiants here are employees," and second, a "sweeping assumption of intimidation is inappropriate" where, as here, the request is limited to statements of witnesses scheduled shortly to appear at a hearing, especially since the Board will make these statements available after the witnesses take the stand (App. 118-119).

It is also significant, however, that the legislative history of the 1974 Amendments reveals that an argument analogous to that advanced by the Board was made during the Senate debates by those seeking to assure blanket protection for the investigatory files of the FBI. Senator Roman Hruska stated his view that the reforms envisioned by the Hart amendment would cause "the sources for FBI information [to] dry up" due to the fear by potential informants of coercion or retaliation if their statements were to become known:

> The passage of [Senator Hart's] proposed amendment would undoubtedly have the effect of inhibiting FBI informants and citizens from coming forth to offer vital bits of information to the FBI. They will no longer feel confident that

> their names will remain secret from public scrutiny, possibly subjecting them to embarrassment and/or reprisals. The net result will be a crippling effect on the FBI's ability to garner information and obtain successful prosecution in criminal cases.

Source Book at 340, 341. *See also id.* at 348 (where Senator Hruska emphasized the potential for coercion in the organized crime area). Senator Edward Kennedy, the principal author of the remaining 1974 amendments, answered Senator Hruska's concerns with the assurance that the amendment proposed by Senator Hart would indeed protect against such specific harms to law enforcement efforts. He added, however, that the "thrust of the amendment" was to require federal agencies "to be *specific* about safeguarding the legitimate investigations that would be conducted. . . ." Source Book at 349 (emphasis added).[5]

---

[5] The Board's complaint that disclosure will have a possible chilling effect on the willingness of witnesses to provide information in future investigations is a problem specifically addressed by Congress in exemption 7(D). The Board obviously recognizes, however, that the Act's protections for confidential informants do not apply in cases where, as here, sources have agreed to have their identities disclosed at the hearing. *See* H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974). In addition, since unfair labor practice proceedings are civil in nature, Congress indicated that the Board could never withhold such statements in their entirety under this rationale, but only the names of informants and other identifying details. *Id.*, 5 U.S.C. § 552(b)(7)(D). The Board should not be permitted to avoid Congress' determination as to the extent of protection to be afforded agency sources by stretching exemption 7(A) to cover information that Congress refused to protect under exemption 7(D).

In short, both the language and the legislative history of the 1974 amendments to exemption 7 demonstrate Congress' explicit disapproval of any blanket exemption for classes or categories of investigatory records. We submit that these reforms came about because actual experience had demonstrated how *per se* nondisclosure rules were capable of completely subsuming the public's right to know about the law enforcement activities of the government. Indeed, even in the NLRB context, experience has already shown the difficulty that courts have encountered in limiting the reach of the Board's *per se* approach to exemption of its investigatory files. Courts which have accepted the Board's argument that the potential for employer intimidation of employees is so great in every case as to relieve the Board of its obligation to specifically justify nondisclosure of employee affidavits have also extended boiler plate exemption 7(A) protection to statements by non-employees, *Title Guarantee Company v. NLRB, supra; New England Medical Center Hospital v. NLRB*, 548 F.2d 377, 382-83 (1st Cir. 1976); *but see Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1143 (9th Cir. 1976), as well as to statements in closed files which may have some conceivable relation to pending cases, *New England Medical Center Hospital v. NLRB, supra*, 548 F.2d at 386. Moreover, while one circuit has rejected the Board's efforts to withhold statements obtained in an unfair labor practice investigation that ended in a decision not to issue a complaint, since there were "*no* enforcement proceedings pending [and none] contemplated . . .," *Poss v. NLRB*, 565 F.2d 654, 657 (10th Cir. 1977), the Board continues to advance the position before this Court that such statements should be protected from disclosure even in the absence of a particularized showing of harm (Pet. Br. at 33 n.17).

We do not argue, however, that the courts should ignore the context in which unfair labor practice proceedings arise in making an exemption 7(A) determination in a particular case. We fully agree with the court of appeals' recognition that exemption 7(A) would be available where a showing has been made by the NLRB that intimidation of witnesses was likely to occur during the five days between discovery and a particular Board hearing (App. 120). Indeed, evidence of the potential for coercion in a particular industry or in the context of a particular type of dispute may be introduced to support the Board's argument that witness statements are entitled to protection in certain unfair labor practice cases. The Board must nevertheless be required to make a particularized showing of interference sufficient to insure that no material is withheld beyond that afforded protection by Congress.

In this regard, the court of appeals identified numerous factors that bear upon such an inquiry in Board proceedings:

> whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give. *See Temple-Eastex, Inc. v. NLRB*, 410 F. Supp. 183 (E.D. Tex., 1976) (ordering disclosure of witness statements favorable to employer) [App. 120].

See also Local 30, United States Tile and Composition Roofers v. NLRB, 408 F. Supp. 520 (E.D. Pa. 1976) (a sufficient showing of a substantial danger of intimidation was made where the charges at issue concerned repeated acts of violence). This approach, by conforming with Congressional intent that the circumstances of each case be examined, will make it possible to distinguish between those records that may be released and those which, if disclosed, will actually compromise the Board's valid law enforcement interests. *See, e.g., Charlotte-Mecklenberg Hospital Authority v. Perry*, Nos. 76-2272 and 76-2273 (4th Cir., January 26, 1978) (in which the court found that the potential for intimidation in an employment discrimination case brought by the EEOC had been sufficiently demonstrated to justify the pre-hearing withholding of statements by present employees, but not the statements of persons no longer employed by the company). While the Board argues that such a case-by-case approach is a task for which the courts are ill-equipped, and that application of the requirements of the FOIA in unfair labor practice proceedings would be likely to result in delay (Pet. Br. at 40-43), we simply suggest that, in light of the legislative history of the 1974 amendments, such arguments for a wholesale exemption for NLRB files must be made to Congress and not to this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DIANE B. COHN
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Amicus Curiae

April 21, 1978